Machinchang Skyways Sdn Bhd & Anor v Lembaga Pembangunan Langkawi & Anor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS K-02(IM)-2716–11 OF 2012 AND K-02(IM)-2808–11 OF 2012
ABDUL WAHAB PATAIL, BALIA YUSOF AND TENGKU MAIMUN JJCA
25 SEPTEMBER 2014

Civil Procedure — Limitation — Computation of time — Action for breach of contract — Time to start running upon occurrence of infringement or threat of infringement of plaintiffs' rights under the contract — Tort of conspiracy — Whether limitation period expired — Limitation Act 1953 s 6 — Public Authorities Protection Act 1948 s 2 — Lembaga Pembangunan Langkawi Act 1990 s 6

Civil Procedure — Limitation — Estoppel — Whether defendant's letter granting plaintiff liberty to refile action estopped defendant from raising defence of limitation — Nothing in letter to suggest defendants agreeing to refiling outside limitation period — Whether limitation period applicable

The first respondent/first defendant ('LADA') was the owner of the Langkawi Cable Car System ('the cable car system'). On 28 August 2002, LADA entered into a joint venture agreement ('the JVA') with the first appellant/first plaintiff to form a joint venture entity (the second plaintiff) to operate the cable car system. On 30 November 2002 the first defendant entered into an agreement with the second defendant whereby the second defendant was appointed as the exclusive operator of the cable car system ('the Prasarana Agreement'). On 10 December 2002 the plaintiffs filed a suit against the defendants ('the first suit') to restrain them from interfering with the operation of the cable car system and for damages arising from the breach of JVA. The parties later agreed to settle the matter and the plaintiffs withdrew the first suit. The plaintiffs claimed that the first defendant through its solicitors' letter dated 3 January 2003 ('letter dated 3 January 2003') represented that it would make appropriate compensation for the plaintiffs' losses and that if the parties were unable to reach a settlement in due course, the plaintiffs were at liberty to file a fresh suit to recover the losses and damages suffered. No settlement was reached between the parties and hence on 20 November 2008 the plaintiffs filed a fresh suit against the defendants based on tort of conspiracy, breach of the JVA and tort of inducement of breach of contract. The defendants contended that the plaintiffs' suit was barred by limitation under the Limitation Act 1953 ('the Act') and/or the Public Authorities Protection Act

1948 ('the PAPA'). The first defendant counterclaimed against the plaintiffs for a declaration that the JVA be terminated jointly, for the surrender of vacant possession of the retail outlets at the cable car station and for damages arising from the second plaintiff's occupation of these retail outlets. The defendants applied under O 14A and/or O 33 r 2 of the Rules of the High Court 1980 seeking determination of the issue whether the plaintiffs' suit was barred by limitation pursuant to s 6 of the Act and/or s 2 of the PAPA. The High Court allowed the defendants' application, struck out the plaintiffs' action and allowed the defendants' counterclaim. The plaintiffs appealed against that decision.

Held, dismissing the appeals with costs of RM15,000:

(1) The plaintiffs knew about the second defendant taking over the management of the cable car system on 10 November 2002. Hence, it was at that point of time that there was an infringement or threat of infringement of the plaintiffs' rights under the JVA. If there was any conspiracy between the defendants as alleged by the plaintiffs, it would also be on 10 November 2002. On 10 November 2002, the entire set of facts giving rise to an enforceable claim were present. Therefore, the filing of the fresh suit by the plaintiffs on 23 November 2008 was clearly beyond the six years limitation period for the cause of action for contract under s 6 of the Act and beyond the three years limitation period under the PAPA48 which was applicable to the first defendant pursuant to s 6 of the Lembaga Pembangunan Langkawi Act 1990. Since the three years limitation period had expired, there was no issue of the plaintiffs suing the first defendant for the tort of conspiracy (see paras 22–23 & 27).

(2) The plaintiffs had relied on the letter dated 3 January 2003 to contend that the defendants had represented that the plaintiffs were at liberty to refile an action and were therefore estopped from pleading the issue of limitation. There was nothing in the said letter to suggest that the defendants had agreed to the refiling of a fresh suit outside the limitation period. It was reasonable to expect the plaintiffs to comply with the requirement of the law on limitation in the event they decided to file a fresh suit (see paras 28 & 30).

(3) The judgment given on the first defendant's counterclaim was not perverse given that the plaintiffs had surrendered the cable car system to the second defendant (see para 31).

[Bahasa Malaysia summary

Reponden pertama/defendan pertama ('LADA') adalah pemilik Sistem Kereta Kabel Langkawi ('sistem kereta kabel'). Pada 28 Ogos 2002, LADA memasuki perjanjian usaha sama ('JVA') dengan perayu pertama/plaintif pertama untuk menubuhkan entiti usaha sama ('plaintif kedua') untuk mengoperasikan sistem

kereta kabel. Pada 30 November 2002 defendan pertama memasuki suatu perjanjian dengan defendan kedua yang mana defendan kedua telah dilantik sebagai operator eksklusif sistem kereta kabel (Perjanjian Prasarana). Pada 10 Disember 2002 plaintif-plaintif memfailkan saman terhadap defendan-defendan ('saman pertama') untuk menghalang mereka daripada mencampuri operasi sistem kereta kabel dan untuk ganti rugi yang timbul daripada kemungkiran JVA. Pihak-pihak kemudiannya bersetuju untuk menyelesaikan perkara itu dan plaintif-plaintif menarik semula saman pertama. Plaintif-plaintif mendakwa bahawa defendan pertama melalui surat peguamcaranya bertarikh 3 Januari 2003 ('surat 3 Januari 2003') membuat representasi bahawa ia akan membuat pampasan yang sewajarnya untuk kerugian plaintif-plaintif dan bahawa jika pihak-pihak tidak boleh untuk mencapai penyelesaian dalam masa terdekat, plaintif-plaintif mempunyai kebebasan untuk memfailkan saman baru untuk mendapatkan kembali kerugian dan ganti rugi yang dialami. Tiada penyelesaian yang dicapai antara pihak-pihak dan oleh itu pada 20 November 2008 plaintif-plaintif memfailkan saman baru terhadap defendan-defendan berdasarkan tort konspirasi, kemungkiran JVA dan tort dorongan kemungkiran kontrak. Defendan berhujah bahawa saman plaintif-plaintif terhalang oleh had masa di bawah Akta Had Masa 1953 ('Akta') dan/atau Akta Keselamatan Pegawai Awam 1948 ('PAPA'). Defendan pertama menuntut balas terhadap plaintif-plaintif untuk deklarasi bahawa JVA ditamatkan secara bersama, bagi penyerahan milikan kosong premis perniagaan di stesen kereta kabel dan untuk ganti rugi yang timbul daripada pendudukan plaintif kedua di premis perniagaan itu. Defendan memohon di bawah A 14A dan/atau A 33 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 memohon penentuan isu sama ada saman plaintif terhalang oleh had masa menurut s 6 Akta dan/atau s 2 PAPA. Mahkamah Tinggi membenarkan permohonan defendan, membatalkan tindakan plaintif dan membenarkan tuntutan balas defendan. Plaintif merayu terhadap keputusan itu.

Diputuskan, menolak rayuan-rayuan dengan kos sebanyak RM15,000:

(1) Plaintif mengetahui tentang defendan kedua mengambil alih pengurusan sistem kereta kabel pada 10 November 2002. Oleh itu, adalah pada masa itu bahawa terdapat suatu pelanggaran atau ancaman pelanggaran hak plaintif di bawah JVA. Jika terdapat apa-apa konspirasi antara defendan seperti yang didakwa oleh plaintif, ia juga akan terjadi pada 10 November 2002. Pada 10 November 2002, terdapat keseluruhan set fakta yang membawa kepada tuntutan yang boleh dikuatkuasakan. Oleh itu plaintif, memfailkan saman baru pada 23 November 2008 adalah jelas di luar enam tahun tempoh had masa bagi kausa tindakan bagi kontrak di bawah s 6 Akta dan lebih dari tiga tahun tempoh had masa di bawah PAPA yang boleh diguna pakai untuk defendan pertama menurut s 6 Akta Lembaga Pembangunan Langkawi

1990. Oleh kerana tiga tahun tempoh had masa telah tamat tempohnya, tidak ada isu plaintif mendakwa defendan pertama bagi tort konspirasi (lihat perenggan 22–23 & 27).

(2) Plaintif telah bergantung kepada surat bertarikh 3 Januari 2003 untuk berhujah bahawa defendan-defendan telah membuat representasi bahawa plaintif-plaintif mempunyai kebebasan untuk memfailkan semula tindakan dan oleh itu diestop daripada memplidkan isu had masa. Tiada apa di dalam surat tersebut yang mencadangkan bahawa defendan-defendan bersetuju kepada pemfailan semula saman baru di luar tempoh had masa. Adalah munasabah untuk menjangkakan plaintif-plaintif untuk menurut kehendak undang-undang terhadap had masa dalam keadaan mereka sudah membuat keputusan untuk memfailkan saman baru (lihat perenggan 28 & 30).

(3) Penghakiman diberikan kepada tuntutan balas defendan pertama bukanlah tidak wajar diberikan memandangkan plaintif-plaintif telah menyerahkan sistem kereta kabel kepada defendan kedua (lihat perenggan 31).]

Cases referred to

Kerajaan Malaysia & Ors v Lay Kee Tee & Ors [2009] 1 MLJ 1; [2009] 1 CLJ 663, FC (refd)

Lee Hock Ning v Government of Malaysia [1972] 2 MLJ 12, FC (refd)

Nasri v Mesah [1971] 1 MLJ 32, FC (refd)

Puspavathy a/l Thaveethu v Majlis Perbandaran Klang & Ors and other appeals [2008] 6 MLJ 672; [2008] 6 CLJ 626, CA (refd)

Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394, CA (refd)

SCK Group Bhd & Anor v Sunny Liew Pang & Anor [2011] 4 MLJ 393, CA (refd)

Legislation referred to

Lembaga Pembangunan Langkawi Act 1990 s 6
Limitation Act 1953 s 6
Public Authorities Protection Act 1948 s 2
Rules of the High Court 1980 O 14A, O 33, O 33 r 2

Appeal from: Civil Suit No 22–309 of 2008 (High Court, Alor Setar)

Harpal Singh Grewal (CK Lim, Reny Rao and Chuah Yih Chuan with him) (Chooi, Saw & Lim) for the appellants.

Karin Lim (Shamshul bin Jamil with him) (Presgrave & Mathews) for the respondents.

Tengku Maimun JCA (delivering judgment of the court):

[1] Both appeals were filed by the appellants/plaintiffs against the decision of the High Court at Alor Setar in allowing the respondents/defendants' application under O 14A and/or O 33 of the Rules of the High Court 1980 ('the RHC'), which resulted in the appellants/plaintiffs' action being struck out and judgment entered for the first respondent/the first defendant's counterclaim. We heard both the appeals together and had dismissed the same. For ease of reference, in this judgment the parties will be referred to as they were in the High Court and any reference to the appeal record will be the record for Appeal No K-02(IM)-2716–11 of 2012.

THE BACKGROUND

[2] Lembaga Pembangunan Langkawi ('LADA') was the owner of the Langkawi Cable Car System ('the cable car system'). On 28 August 2002, LADA ('the first defendant') entered into a joint venture agreement ('the JVA') with Machinchang Skyways Sdn Bhd ('the first plaintiff') in which both parties had agreed amongst others, to form a joint venture entity to manage, maintain and operate the cable car system. The joint venture entity formed for that purpose was Langkawi Cable Car Sdn Bhd ('the second plaintiff').

[3] On 30 November 2002 the first defendant entered into an agreement with Sykt Prasarana Negara Bhd ('the second defendant') whereby the second defendant was appointed as the exclusive operator for the maintenance, operation and management of the cable car system ('the Prasarana Agreement').

[4] On 10 December 2002 the plaintiffs filed a suit against the defendants ('the first suit'), inter alia, to restrain them from interfering with the operation of the cable car system and for damages arising from the breach of JVA.

[5] The plaintiffs contended that at the material time, the first defendant had approached the first plaintiff to settle the matter. The plaintiffs withdrew the first suit but continued to maintain control of the cable car system pending negotiation of a settlement.

[6] It is the plaintiffs' case that in response to the plaintiffs' terms of settlement in a letter dated 2 January 2003, the first defendant through its solicitors letter dated 3 January 2003 represented that it would make appropriate compensation for the plaintiffs' losses and damages and that if the parties were unable to reach a settlement in due course, the plaintiffs were at liberty to file a fresh suit to recover the losses and damages suffered.

[7] Pending the finalisation of the proposed settlement, the plaintiffs had delivered possession of the cable car system to the second defendant. **A**

[8] No settlement was reached between the parties. On 20 November 2008, the plaintiffs filed a fresh suit against the defendants. In the fresh suit (the subject suit of the appeals herein), where the plaintiffs' cause of action was based on tort of conspiracy; breach of JVA and tort of inducement of breach of contract, the plaintiffs pleaded, inter alia, that: **B**

(a) the second defendant had wrongfully and without reasonable basis or justification induced the first defendant to breach the JVA by offering themselves to be appointed to manage the cable car system and/or has influenced and/or has encouraged the first defendant to enter into the Prasarana Agreement with the second defendant which had caused losses to the plaintiffs; and **C**

(b) around 30 November 2002 whether prior to or subsequent to the Prasarana Agreement, the first and the second defendants had conspired to injure the interest of the plaintiffs. **D**

[9] Essentially, the defence of the defendants was that the Prasarana Agreement was signed between the first defendant and the second defendant based on the decision of the Minister of Finance and the Prime Minister then; that the plaintiffs have voluntarily surrendered the management of the cable car system and that the plaintiffs had acquiesced to the surrender. The defendants denied the allegation of conspiracy and pleaded that the plaintiffs' fresh suit is barred by limitation under the Limitation Act 1953 and/or the Public Authorities Protection Act 1948 ('the PAPA Act'). The first defendant counterclaimed against the plaintiffs for a declaration that the JVA be terminated jointly. As against the second plaintiff, the first defendant prayed for the surrender of vacant possession of the retail outlets which was carried out by the second plaintiff at the cable car station and for damages arising from the second plaintiff's occupation of these retail outlets. **E** **F** **G**

[10] The first and the second defendants then took out separate applications under O 14A and/or O 33 r 2 of the RHC 1980 (encls 42 and 43 respectively), seeking the determination of the following questions of law; namely whether the plaintiffs' fresh suit was barred by limitation pursuant to s 6 of the Limitation Act 1953 and/or s 2 of the PAPA Act. The applications also prayed for the fresh suit to be dismissed and in respect of encl 42, for final judgment to be entered against the second plaintiff in terms of the first defendant's counterclaim. **H** **I**

[11] The learned judicial commissioner allowed the applications. In a single judgment written for both applications, the learned judicial commissioner

found as follows:

> [15] Di dalam kes ini mahkamah dapati kausa tindakan berlaku pada 10 November 2002 manakala writ saman dan penyata tuntutan difailkan pada 23 November 2008, oleh yang demikian mahkamah putuskan tindakan plaintif adalah difailkan di luar tempoh masa enam tahun berdasarkan peruntukan di bawah Akta Had Masa ...
>
> [16] Merujuk kepada Akta Perlindungan Pihak Berkuasa Awam 1948, yang mana dinyatakan sebarang tindakan yang ingin diambil bagi isu-isu berkaitan komplot, hendaklah difailkan dalam masa 36 bulan daripada berlakunya aduan komplot. Di dalam kes ini plaintif telah mengetahui mengenai fakta bahawa defendan pertama telah melantik defendan kedua untuk menguruskan operasi sistem kereta kabel di Langkawi pada 10 November 2002 melalui surat daripada peguamcara defendan kepada peguamcara plaintif. Plaintif mengakui membalas surat bertarikh 10 November 2002 yang dijawab pada 14 November 2002.
>
> [17] Plaintif kedua telah menyerah kereta kabel kepada kedua-dua defendan dengan sukarela. Perlakuan Plaintif menunjukkan bahawa plaintif telah bersetuju ('acquiesced') untuk menyerahkan hak pengurusan, perkhidmatan dan penyelenggaraan dan operasi sistem kereta kabel.
>
> [18] Keterangan yang dikemukakan dalam afidavit kedua-dua pihak menunjukkan bahawa plaintif memang mengetahui tentang tindakan yang diambil oleh defendan mengenai operasi kereta kabel seawal 10 November 2002 seperti yang terkandung dalam surat bertarikh 8 Disember 2002.
>
> [19] Berdasarkan alasan-alasan di atas mahkamah membenarkan permohonan defendan pertama dan defendan kedua di Lampiran 42 dan 43 di bawah Kaedah 14A Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dengan kos sebanyak RM3,000.

THE APPEAL

[12] It was the submission of learned counsel for the plaintiffs that the disposal of the fresh suit under O 14A and/or O 33 r 2 is inappropriate as the question posed by the defendants in their application is a mixed question of law and fact; that the facts relied upon by the defendants are hotly disputed and that the question of when the plaintiffs' cause of action started to accrue is a question of fact. The plaintiffs contended that the causes of action against the first defendant started to accrue from 30 November 2002 ie the date of the Prasarana Agreement and the appointment of the second defendant to operate the cable car system and that the act of breach by the defendants only occurred on 30 November 2002 and not on 10 November 2002.

[13] Likewise, learned counsel submitted, the cause of action against the second defendant also started to accrue from 30 November 2002 because the entire set-of facts giving rise to a cause of action on tort of conspiracy and tort to induce breach of contract existed only when the JVA was breached, ie on

30 November 2002. Hence it was contended that the filing of the fresh suit on 23 November 2008 did not exceed the six years limitation period.

[14] Citing *Lee Hock Ning v Government of Malaysia* [1972] 2 MLJ 12; *Puspavathy a/l Thaveethu v Majlis Perbandaran Klang & Ors and other appeals* [2008] 6 MLJ 672; [2008] 6 CLJ 626, learned counsel for the plaintiffs submitted that the learned judicial commissioner erred in failing to consider that the first defendant could not rely on s 2 of the PAPA Act when the act complained of is the breach of contract and that the PAPA Act does not apply to the second defendant.

[15] The other issue raised by learned counsel for the plaintiffs was that the learned judicial commissioner erred in making a finding of fact that the plaintiffs had voluntarily handed over the cable car system to the second defendant when the applications before Her Ladyship was only to determine the relevant question of law.

[16] In respect of the judgment on the first defendant's counterclaim, learned counsel for the plaintiffs submitted that there was no basis for the learned judicial commissioner to allow the counterclaim when the first defendant had not proved that the plaintiffs were occupying the retail outlets without the first defendant's consent or permission.

OUR DECISION

[17] The main issue for our determination was on the appropriateness of O 14A and/or O 33 r 2 applications. In a nutshell, the submission for the plaintiffs was that in all the circumstances of the case, the conduct of the defendants in dealing with the plaintiffs is an issue that requires thorough investigation at a full trial given the hotly disputed facts in this case.

[18] Contrary to the submissions of learned counsel for the plaintiffs, we found that the following material facts are not in dispute:

(a) the first plaintiff and the first defendant had entered into the JVA;

(b) the first defendant and the second defendant had entered into the Prasarana Agreement;

(c) the appointment of the second defendant to operate the cable car system was pursuant to the decision of the then Minister of Finance and also the Prime Minister, the same manner that the JVA was entered into between the first plaintiff and the first defendant;

A (d) in adherence to the decision of the Prime Minister, the second plaintiff had surrendered the cable car system to the second defendant in good faith; and

(e) the only issue outstanding between the plaintiffs and the defendants was in respect of payment of compensation or the 'out of pocket expenses' incurred by the plaintiffs.

[19] Learned counsel for the plaintiffs had submitted that the plaintiffs' causes of action accrued on 30 November 2002 and not on 10 November 2002. We were not able to agree with learned counsel.

[20] Paragraph 54 of the amended statement of claim shows that the plaintiffs knew about the date 10 November 2002 when the plaintiffs pleaded as follows:

> 14.1.1 Mukadimah tersebut secara curang tidak melambangkan keadaan yang sebenarnya:
>
> (a) pada tanggal 01/11/2002 suatu upacara 'trial run' telah dilakukan sambil menarik 1608 orang penumpang;
>
> (b) pada tanggal 10/11/2002 telah dicatatkan bahawa Tan Sri Nor Mohamad Yaccob telah mendapatkan persetujuan Perdana Menteri supaya Defendan Kedua mengambil alih operasi Kereta Kabel Langkawi.

[21] The fact that the plaintiffs knew about the second defendant taking over the maintenance, operation and management of the cable car system on 10 November 2002 is also evident from the plaintiffs' solicitors letter dated 8 December 2002 to the first defendant which states, inter alia:

> We are also instructed that by a letter dated 10th November 2002, you had informed LCCSB that you had been directed by the Honourable Prime Minister Dato Seri Dr Mahathir Mohamed that the matter of the Business was to be withdrawn from LCCSB and given to Syarikat Prasarana Negara Bhd ....

[22] Given that the plaintiffs had known on 10 November 2002 of the fact that the maintenance, operation and management of the cable car system was given to the second defendant, it would be at that point of time that there was an infringement or threat of infringement of the plaintiffs' rights under the JVA. And if there is any conspiracy between the first and the second defendants as alleged by the plaintiffs, it would also be on 10 November 2002. On 10 November 2002, the entire set-of facts giving rise to an enforceable claim were present (see *Nasri v Mesah* [1971] 1 MLJ 32).

[23] Hence, the filing of the fresh suit by the plaintiffs on 23 November 2008 was clearly beyond the six years limitation period for the cause of action for contract under s 6 of the Limitation Act 1953 and beyond the three years limitation period under the PAPA Act which is applicable to the first defendant pursuant to s 6 of the Lembaga Pembangunan Langkawi Act 1990 which provides:

> 6 The Public Authorities Protection Act 1948 [Act 198] shall apply to any action, suit, prosecution or proceeding against the Lembaga or against any member, officer, servant or agent of the Lembaga in respect of any act, neglect or default done or committed by him in such capacity.

[24] Learned counsel for the appellants had submitted that the defendants' applications were in substance striking out applications based on a plea of limitation. In this respect learned counsel submitted that the statute of limitation merely bars the remedy of the plaintiffs but not their cause of action.

[25] In our view, the defendants were at liberty to file the said applications. In *Kerajaan Malaysia & Ors v Lay Kee Tee & Ors* [2009] 1 MLJ 1; [2009] 1 CLJ 663, Nik Hashim FCJ said:

> 23. Regarding the issue of limitation of time, the Court of Appeal appears to interpret it as barring a remedy but not the right to sue. That is not correct. In so far as PAPA is concerned, the law is settled. The Privy Council in *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1; [1983] 1 CLJ 11; [1983] CLJ (Rep) 56 held that limitation under PAPA is 'just as much a 'right' as any other statutory or contractual protection against a future suit'.
>
> 24. In this respect, both the Court of Appeal and the Federal Court have consistently struck out claims when it was clear that the statute of limitations would be relied on or raised.

[26] Vide para 33 of the amended statement of claim, the plaintiffs' pleaded the following reliefs against the defendants:

> 33. Oleh yang demikian, Plaintif-Plaintif menuntut daripada Defendan-Defendan yang berikut:
>
> (a) penghakiman bahawa Defendan Pertama dan Defendan Kedua bayar ganti-rugi am kepada Plaintif Pertama dan Plaintif Kedua seperti ditaksirkan oleh Penolong Kanan Pendaftar Mahkamah Tinggi di Alor Setar atas sebab perbuatan tort komplot dan seterusnya faedah pada kadar 8% setahun adalah atas jumlah ganti-rugi am yang ditaksirkan daripada tarikh penghakiman hingga penyelesaian;
>
> (b) secara alternatif kepada relif (c) di atas, (sic) penghakiman bahawa Defendan Kedua bayar ganti-rugi am kepada Plaintif-Plaintif seperti ditaksirkan oleh Penolong Kanan Pendaftar Mahkamah Tinggi di Alor Setar atas sebab perbuatan tort menganggu dengan perniagaan

Plaintif-Plaintif dan seterusnya faedah pada kadar 8% setahun atas jumlah ganti-rugi am yang ditaksirkan daripada tarikh penghakiman hingga penyelesaian;

(c) terhadap Defendan Pertama sahaja dan untuk manfaat Plaintif Pertama sahaja, penghakiman bahawa Defendan Pertama bayar ganti-rugi am kepada Plaintif Pertama seperti ditaksirkan oleh Penolong Kanan Pendaftar Mahkamah Tinggi di Alor Setar atas sebab kemungkiran Perjanjian Usahasama tersebut dan seterusnya faedah pada kadar 8% setahun atas jumlah ganti-rugi am yang ditaksirkan daripada tarikh penghakiman hingga penyelesaian;

(d) terhadap Defendan Kedua sahaja dan untuk manfaat Plaintif Pertama sahaja, penghakiman bahawa Defendan Kedua bayar ganti-rugi am kepada Plaintif Pertama seperti ditaksirkan oleh Penolong Kanan Pendaftar Mahkamah Tinggi di Alor Setar atas sebab perbuatan tort mendorong Defendan Pertama untuk memungkiri Perjanjian Usahasama tersebut;

(e) Defendan Pertama dan Defendan Kedua bayar kepada Plaintif Pertama dan Plaintif Kedua kos tindakan ini atas dasar kos peguam-anak guam; dan

(f) perintah dan/atau relif lain yang didapati suai manfaat oleh Mahkamah yang Mulia ini.

[27] Since the three years limitation period has expired, there is no issue of the plaintiffs suing the first defendant for the tort of conspiracy. Consequently, the cause of action of conspiracy against the second defendant cannot stand, as one of the ingredients to be satisfied in regard to the tort of conspiracy is that there must be an agreement between two or more persons (see *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394; *SCK Group Bhd & Anor v Sunny Liew Pang & Anor* [2011] 4 MLJ 393).

[28] The plaintiffs had relied on the 'without prejudice' letter dated 3 January 2003 (at p 743: RR *Jld* 2(3) *Bhgn* B and C) to contend that the defendants had represented that the plaintiffs are at liberty to refile an action and is therefore estopped from pleading the issue of limitation. The relevant part of the letter reads:

> 3. Your clients should take cognizance that our client is a statutory body and will in all reasonable circumstances honour its obligations. In the event that parties are unable to reach a settlement your clients are at liberty to file a fresh action against our client.

[29] On this issue, the learned judicial commissioner had made the following finding:

[12] ... Mahkamah tidak dapat menerima alasan plaintif bahawa tindakan ini lambat diambil terhadap defendan kerana terdapat rundingan untuk penyelesaian kerana rundingan dan perbincangan itu dibuat atas dasar 'without prejudice'. Merujuk kepada kes *Malayan Banking v Foo See Moi* [1981] 2 MLJ 17, hakim Mahkamah Agong Chang Min Tat memutuskan bahawa:

It is settled law that letters written without prejudice are inadmissible in evidence of the negotiation attempted.

[13] Dalam kes *Nagandran a/l Kalianna Gaundar (t/a Raju Restoran) v Melinda Alison Monteiro & Ors* [2011] 4 MLJ 234:

It is pertinent to note that parties often make statement 'without prejudice' as part of an attempt to settle a dispute. When this is done, the contents of the statement cannot be put in evidence without the express consent of both parties.

[30] In our view, the learned judicial commissioner had not erred in refusing to admit the said letter. In any event, we found that there is nothing in the said letter to suggest that the defendants had agreed to the refiling of a fresh suit outside the limitation period. It is reasonable to expect the plaintiffs to comply with the requirement of the law on limitation in the event they decided to file a fresh suit.

[31] The judgment given on the first defendant's counterclaim in our view is not perverse given that the plaintiffs had surrendered the cable car system. The first defendant had made the following averment in the 'Afidavit Balasan Defendan Pertama' (p 181: RR *Jld* 2(1) *Bhgn* B and C):

14. ... Tiada asas untuk Plaintif-Plaintif terus menduduki serta menjalankan perniagaan di gerai-gerai di stesen kereta kabel tanpa membayar sebarang sewa.

We did not find any affidavit from the plaintiffs to deny or rebut the above averment.

[32] Based on all the above, it was our unanimous view that the learned judicial commissioner has not erred in allowing the defendants applications. We accordingly dismissed the appeals with costs of RM15,000 and ordered that the deposit be refunded to the appellants/plaintiffs.

Appeals dismissed with costs of RM15,000.

Reported by Kanesh sundrum